IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP No.211/1998

Union of India ..... Petitioner
! through: Mr.A.K.Bhardwaj, Advocate

VERSUS

$ M/s. Best Cold Storage &
Vegetables Dehydrators ..... Respondent
through: None.

% **DATE OF DECISION:** 09-11-2006

CORAM:

* Hon'ble Mr.Justice Pradeep Nandrajog

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: **PRADEEP NANDRAJOG, J.(Oral)**

1. Award dated 6th February,1998 published by Shri S.B.Sharan has been challenged by the Union of India.

2. Before dealing with the objections of UOI, a preliminary objection taken by the respondent may be decided.

3. It is stated that the objections were filed on 3rd September, 1998 and are therefore barred by limitation.

4. The objection is frivolous for the reason petition was filed on 9th July, 1998 evidenced by the objections notified on 18.7.1998.

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Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

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The objection-sheet records that vide filing No.8946, petition was filed on 9.7.1998.

5. As stated by learned counsel for UOI limitation has to be commenced with effect from the date when parties are notified of the making of the award.

6. Dealing with merits, suffice would it be to note that the respondent had responded to a notice inviting tender issued by UOI for supply of dehydrated potatoes. Tender documents clearly specified that successful tenderer would have to deposit by way of security a sum equal to 10% of the value of the contract.

7. Respondent's offer of supplying 20 MT dehydrated potatoes at Rs.6,86,000/- was accepted and a letter of award was issued.

8. Respondent was to submit security equivalent to 10% of the value of the contract, i.e. Rs.68,600/-.

9. Contract required supplies to be effected in 3 stages. 10 MT by February, 1993, 5 MT by April,1993 and 5 MT by August 1993. Supplies were not made.

10. Contract stipulated pre-delivery inspection which was done. Goods offered were rejected as some samples failed. Respondent appealed against the rejection to a board. The board opined that if inferior quality goods could be segregated, rest may be allowed to be supplied.

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11. On 19th August, 1993 (vide Ex.-J in the record of the Arbitrator) Union of India notified the respondent that it could segregate inferior quality dehydrated potatoes from the ones which were as per the required specifications and supply the same.

12. The respondent wrote 2 letters dated 28.8.1993 and 20.9.1993 (Ex.-L and Ex.-N respectively in the record of arbitration) stating that the dehydrated potatoes which he wants to supply may be accepted. In between, on 30.8.1993 UOI wrote a letter (Page U-85 of the arbitrator record) informing that time for effecting supplies was extended by 30.9.1993, subject to the condition that security deposit in sum of Rs.68,600/- was furnished latest by 13.9.1993 and payment made to effect the necessary supplies.

13. Vide termination letter dated 4.11.1993 (Page U-89 of the arbitrator record) contract was terminated and respondent was informed that UOI would proceed for risk purchase by re-tendering. On 8.11.93 (letter at page C-20 of record of arbitrator) respondent said that he would effect delivery by 30.11.93.

14. At the re-tender stage, supplier participated once again. His offer was the lowest but was not accepted in as much as he once again failed to furnish this necessary security deposit. Contract was awarded to the next party.

15. UOI invoked the arbitration clause and sought to recover damages for the higher value paid at the risk purchase stage.

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16. Respondent made a claim for loss on account of money spent by him in processing potatoes which were not lifted by the UOI.

17. Learned Arbitrator had declined the claim of UOI and has awarded Rs.2,18,700/- to the supplier on account of cost of raw materials, Rs.2,65,255/- as wasted finished goods, Rs.50,000/- as other expenditure.

18. Reasons of the learned Arbitrator are :-

> "In view of the position as stated above, it appears that the cancellation of contract was not legally valid, as the contract was cancelled without giving opportunity to supply the stores even after DGS&T had written vide their letter dated 19.8.93 addressed to the contractor for considering the tendering of the stores for resampling provided inferior quality of item was segregated and only good quality matching ASC specification was retendered (Exhibit J to the statement of claim of the claimant-contractor). The advance sample was however okayed by the Appeal Board as intimated by DGS&T vide their letter dated 21.5.93 (Exhibit B). In spite of repeated requests of the contractor to allow him to supply the stores already processed and finished neither any opportunity nor any reply was given and the stores was repurchased at higher rates. The contractor-firm participated in the R/P tender enquiry and offered to supply the stores at the lowest rate but was not permitted to supply the stores on the plea of not furnishing security deposit. As such, the principle of mitigation of losses was not taken into consideration while awarding the R/P A/T at higher rates. The R.P.Contract, in such circumstances cannot be treated as a valid contract. It is also seen that the request of the contractor for changing the inspecting authority from CFL Lucknow to Delhi was not considered when the doubt was raised on the integrity of the inspector,

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> as it was necessary to be considered in the interest of fairness, justice and impartial/unmotivated testing of the stores. It appears that the contractor in the circumstances was not allowed to supply the stores without any fault on his part with the result that he was put to have losses for which he has made his claims. The contractor appears to be legally entitled to be compensated for such losses.
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> After having considered the pleadings filed by parties and after having heard the arguments put forth by both the parties, it appears that the claim of the Union of India for Risk Purchase loss does not appear to be justified. However, only part of the claim of the contractor-firm out of Rs.16,47,155/- claimed by him appears to be justified."

19. Learned Arbitrator has noted the stand taken by UOI that the supplier did not even deposit the security deposit of Rs.68,600/- and therefore was in breach of the contract.

20. Surprisingly enough, said aspect of the matter has not been considered by the learned Arbitrator while giving reasons. Further, learned Arbitrator has read the evidence in a most perverse manner evidenced by the fact that after decision of the Appellate Board, as noted above, UOI permitted the respondent to segregate the bad quality goods offered from the ones which meet the required specifications and effect delivery thereof. Learned Arbitrator has further ignored the letter as noted here-in-above written by UOI extending time for effecting delivery till 30th September, 1993 but before doing so called upon the respondent to deposit the security deposit.

21. Finding that the respondent was prevented from effecting supplies is belied from the records, which evidence has been totally eschewed by the learned Arbitrator. It has been ignored that the petitioner vide letter dated 19.8.93 (page C-25) informed the respondent that his consignment can be considered for re-sampling provided inferior quality was segregated and quality matching ASC specification was re-tendered. Vide letter dated 30.8.93 (page U-85), the petitioner even extended time till 30.9.93. Vide letters dated 28.8.93 (page C-23) and 20.9.93 (page C-21) the respondent requested that his consignment be accepted. Interestingly, in said letters he did not even acknowledge petitioner's letters dated 28.8.93 and 20.9.93. Thus learned arbitrators finding that respondent was not given adequate opportunity to supply the goods is perverse and is a result of ignoring material evidence. Learned arbitrator has further ignored respondent's letter dated 8.11.93 (C-20) which shows that even till November, the respondent was not in a position to supply the goods.

22. Finding of the Arbitrator that respondent took all steps to mitigate losses by participating at the risk purchase stage is erroneous in as much as the learned Arbitrator has ignored that even at the risk purchase stage, the respondent failed to deposit the necessary security deposit.

23. It is settled law that where Arbitrator ignores material

evidence, it would be a case of misconduct requiring setting aside of the award. Needless to state, an Arbitrator is bound by his mandate which requires him to consider all material and relevant evidence led.

24. I accordingly allow OMP 211/1998 and set aside the award dated 6th February, 1998 published by Shri S.B.Sharan.

25. It would be open to the parties to take steps in accordance with law should they intend to enforce the arbitration clause in the agreement.

26. No costs.

November 09, 2006
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PRADEEP NANDRAJOG, J.

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% 01.10.2007

Present: Mr.A.K.Bhardwaj, Advocate for the Petitioner.
Major B.P.Singh Chauhan, Advocate for Respondent No.1.

+ RP No.362/2007 (u/Section 114 of CPC) in OMP No.211/1998

* The petitioner seeks review of the Orders dated 09.11.2006 and thus the matter be listed before Pradeep Nandrajog, J who passed the said Orders.

Subject to Orders of Hon'ble the Chief Justice, list the matter before Pradeep Nandrajog, J for directions on 12.10.2007.

A copy of both the petition and the application be supplied to learned counsel for the petitioner during the course of the day.

SANJAY KISHAN KAUL, J.

October 01, 2007
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R.P. 362/07 - for review of order dt. 9-11-06

IA. 11320/07 - for Delay

- at admission stage

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% 12.10.2007

Present: Applicant in person.
Mr. A.K.Bhardwaj, Adv. for UOI.

+R.A.No.362/2007 in O.M.P.No.211/1998
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1. In the absence of any representation from the side of the respondent and hearing arguments by learned counsel for the petitioner, OMP.No.211/1998 was disposed of vide order dated 9.11.2006. Review has been prayed for by the applicant stating that the applicant should be heard.

2. I called upon the applicant to address arguments with reference to the objections. To guide the applicant who appears in person, I have even explained the reasons recorded in the order dated 9.11.2006 as to why the award has been set aside.

3. Suffice would it be to note that at the hearing held today, I have specifically pointed out to the applicant the finding recorded by me, with reference to the record of the arbitrator and as reflected in para 21 of my order dated 9.11.2006, and explained the same.

4. With reference to the record of arbitration, attention of the applicant has been drawn to the other paragraphs of the

order wherein I have noted the documentary evidence placed by UOI before the arbitrator which has not even been considered in the award.

5. With reference to the various letters referred to by me in the order dated 9.11.2006, applicant states that he is not aware of any such letter.

6. I am afraid, letters referred to by me in the order dated 9.11.2006 have been culled out from the record of the learned arbitrator. They constitute the pleading of UOI. Indeed, before the arbitrator, petitioner had not specifically denied the receipt of said letters.

7. Under the circumstances, no case is made out to review the order dated 9.11.2006.

8. Petitioner has been informed that this court had not superseded the arbitration and had left issue open for the parties for fresh adjudication through an arbitrator in terms of the arbitration clause.

9. The review application is dismissed.

October 12, 2007
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PRADEEP NANDRAJOG, J.